IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1560 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SIRAJKHAN NIYAJAKHAN PATHAN

Versus

COMMISSIONER OF POLICE

Appearance:

MR JK PARMAR for Petitioner

NR KAMAL MEHTA ADD. GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 03/04/98

ORAL JUDGEMENT

By this application under Art. 226 of the Constitution of India, the petitioner calls in question the legality and validity of the order of detention dt. 10th October, 1997 passed by the Police Commissioner for the City of Ahmedabad, invoking his powers under Sec.3(2) of the Gujarat Prevention of Anti-Social Activities Act (for short the 'Act'), pursuant to which the petitioner

is, at present, kept under detention.

2. The golden chains snatching incidents in the public places were being brought to the books of the several Police Stations. The Police found that because of such incidents showing upward tendency in number, the people were not feeling safe, they were feeling insecured and that was the cause of the public order being disturbed often. The Commissioner of Police, when examined several records of the Police Stations, found that against the petitioner about four complaints of thefts punishable under Sec. 379 read with Sec. 114 of I.P.Code with Ahmedabad Railway Police Station were lodged. After inquisition, the Police Commissioner also found that the petitioner was carrying out his naferious activities. He was extorting money putting the people in fear of instant death or injury. Those who resisted his demands or commands had to met with dire consequences, as the persons were brutally dealt with and beaten by the petitioner. The Police Commissioner therefore found that because of his such activities, the public life was shattered & battered, and his such subversive activities, disturbing the tempo of the public life were going berserk. The petitioner was therefore required to be apprehended and his activities were required to be curbed immediately. He then preferred to have the statements of the witnesses, but no one was willing to make the statement and lodge the complaint because of dread & terror. After considerable persuation, some of the persons showed their willingness to give the statement and that too when assurance was given that their particulars disclosing their identity would be kept secret. Perusing the statements, it was also noticed that the petitioner had a wide network and was efficiently carrying out his naferious activities with the assistance of his compeers. The Police Commissioner also found that stern action against the petitioner was necessary but any action, if taken, under general law sounding dull would be the futile exercise. The Police Commissioner could see that the only way out was to pass the order of detention, and getting the petitioner arrested, kept him under detention. The impugned order was then passed, with the result the petitioner is under detention. The petitioner has, therefore, by this application, challenged the legality and validity of the order of detention.

3. The order is challenged on several grounds, but at the time of hearing before me, the learned advocate representing the petitioner confined to the only point namely exercise of privilege under Sec. 9(2) of the Act.

According to him, the source of information ought to have been disclosed, without which it was difficult for the petitioner to make effective representation. The petitioner could have addressed the authority as to why the statements were given and whether the statements were reliable but for want of the source, he could not. When necessary particulars for making effective representation were suppressed, the right of the petitioner was jeopardised. The detention order is, therefore, bad in law.

4. In reply to such contention, Mr. Kamal Mehta, learned AGP representing the opponents submitted that under Sec.9(2) of the Act, it was open to the Police Commissioner to exercise his privilege and suppress the material facts. Therefore, studying the material placed before him carefully and after applying the mind, he reached the conclusion that to protect the lives of the witnesses, certain particulars were required to be suppressed. He, therefore, exercised the privilege which was rightly so in the circumstances. There is, therefore, no reason to interfere in the order on that ground.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view

to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujrat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the detaining authority was required to file the affidavit and satisfy the court that it was in the public interest namely to protect the lives of the witnesses, certain particulars about those witnesses were required to be kept secret. It is pertinent to note that in this case, affidavit justifying circumstances for the exercise of the privilege under Section 9(2) of the Act is not filed. When that is so, it should be assumed that without any just cause, the

particulars were suppressed. As the particulars were not given, naturally the petitioner could not know what defence he could take, what were the reasons to state against him, and whether in fact, those witnesses really stated so, or whether they were really in existence. Thus the right to make effective representation is jeopardised. Further, for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind qua the privilege. Thus the requirements of Section 9(2) of the Act are not satisfied and the privilege exercised cannot be said to be just and proper. The order of detention passed is, therefore, bad in law and continued detention is arbitrary and illegal. The same is, therefore, liable to be quashed.

7. For the aforesaid reasons, this petition is allowed. The order of detention passed on 10th October, 1997 by the Police Commissioner, Ahmedabad City, is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forth with, if no longer required in any other case. Rule accordingly made absolute.

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